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JOHN F. DAVIS,

No. 1295

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORTH AMERICAN VAN LINES, INC., *Appellant*

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL, *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

JURISDICTIONAL STATEMENT

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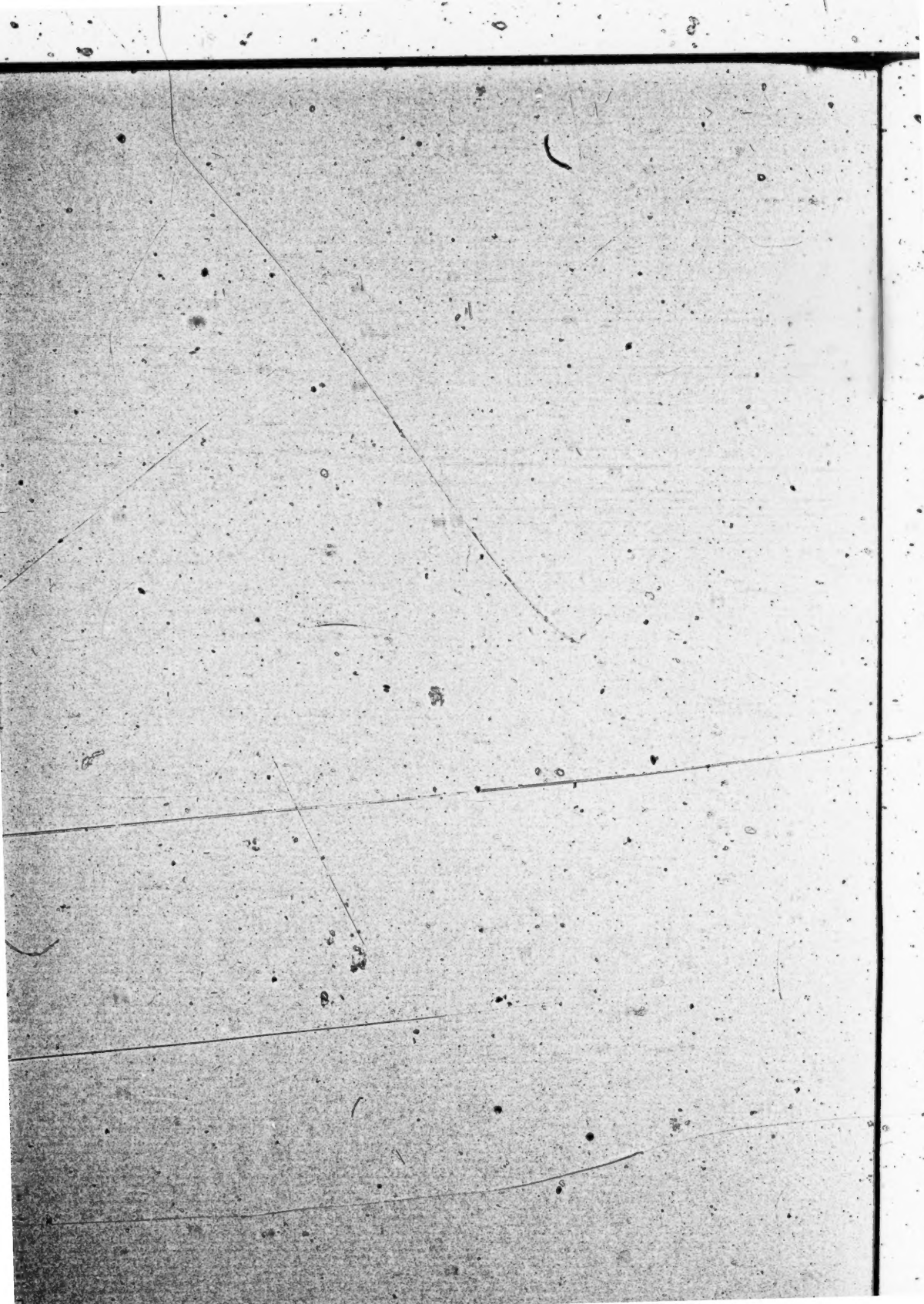

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

JURISDICTIONAL STATEMENT

Appellant, North American Van Lines, Inc., appeals from the judgment of a three judge court convened in the United States District Court for the Northern District of Indiana, Fort Wayne Division, upholding an order of the Interstate Commerce Commission which declared that Appellant's motor carrier certificate of public convenience and necessity No. MC-107012 Sub 30 does not authorize

the transportation of cargo from and to Alaska in the so-called "land-sea-land" mode. The certificate, hereafter sometimes referred to as Sub 30, is printed in Appendix A.

OPINIONS BELOW

The order of the Interstate Commerce Commission is printed in Appendix B. The opinion and judgment of the District Court is officially reported at 277 F. Supp. 741, but for the convenience of this Court it is printed in Appendix C. The District Court did not make separate findings of fact and conclusions of law.

JURISDICTION

Appellant commenced this action by a complaint filed in the District Court invoking the jurisdiction of a three judge court pursuant to 28 U.S.C. §§1336, 1398, 2284, and 2325, and 5 U.S.C. §1009. The complaint prayed that the order of the Interstate Commerce Commission be set aside. On December 20, 1967, the District Court, sitting as a panel of three judges, entered its judgment denying the relief sought. Appellant's notice of appeal was filed in the District Court on February 8, 1968.

The jurisdiction of this Court to review by direct appeal the judgment of the three judge District Court is conferred by 28 U.S.C. §1253, and is sustained by the decision of this Court in *St. Louis & O'Fallon Ry. v. United States*, 279 U.S. 461.

STATUTES INVOLVED

Section 203 (a) (10) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (10), provides:

> The term "interstate commerce" means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by

motor vehicle or partly by motor vehicle and partly by rail, express, or water: *Provided*, That to the extent that such transportation in "interstate commerce" between points in Alaska and points in other states is performed within a foreign country, the application of this part shall not include any requirement as to conduct in such foreign country which is in conflict with a requirement of such foreign country, but shall include as a condition to engaging in such operations within the jurisdiction of the United States, the observance, as to the entire service, of the requirements of this part with respect to rates, fares, charges, and practices pertaining to such transportation.

Section 216 (c) of the Interstate Commerce Act, 49 U.S.C. §316 (c), provides:

Common carriers of property by motor vehicle may establish reasonable through routes and joint rates, charges, and classifications with other such carriers or with common carriers by railroad and/or express and/or water; and common carriers of passengers by motor vehicle may establish reasonable through routes and joint rates, fares, or charges with common carriers by railroad and/or water. In case of such joint rates, fares, or charges it shall be the duty of the carriers parties thereto to establish just and reasonable regulations and practices in connection therewith, and just, reasonable, and equitable divisions thereof, as between the carriers participating therein which shall not unduly prefer or prejudice any of such participating carriers. As used in this subsection, the term "common carriers by water" includes water common carriers subject to the Shipping Act, 1916, as amended, or the Intercoastal Shipping Act of 1939, as amended (including persons who hold themselves out to transport goods by water but who do not own or operate vessels) engaged in the transportation of property in interstate or foreign commerce between Alaska or Hawaii on the one hand, and, on the other, the other States of the Union, and through routes and joint rates so estab-

lished and all classifications, regulations, and practices in connection therewith shall be subject to the provisions of this part."

Section 203 (a) (13) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (13), provides:

> The term "motor vehicle" means any vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power and used upon the highways in the transportation of passengers or property, or any combination thereof determined by the Commission, but does not include any vehicle, locomotive, or car operated exclusively on a rail or rails, or a trolley bus operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service.

Section 203 (a) (14) of the Interstate Commerce Act, 49 U.S.C. §303 (a) (14), provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 212 (a) of the Interstate Commerce Act, 49 U.S.C. §312 (a), provides:

> Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may,

upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; *Provided, however,* That no such certificate, permit or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission made as provided in section 304 (c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder***.

QUESTIONS PRESENTED

1. Must Appellant, as a motor common carrier operating under certificate of public convenience and necessity No. MC-107012 Sub 30, transport cargo from and to Alaska exclusively by highway, or is it authorized to transport such cargo part way by highway and part by water in the so-called "land-sea-land" mode?

2. Does the declaration and order of the Interstate Commerce Commission that the Sub 30 certificate does not authorize Appellant to transport cargo from and to Alaska in the so-called "land-sea-land" mode constitute a limitation, modification or revocation of such certificate without due process of law?

STATEMENT OF THE CASE

Background Of Events Leading To The Proceeding Before The Interstate Commerce Commission

Appellant is an Indiana corporation which has engaged in the transportation of household goods for more than thirty years. It presently holds certain certificates of public convenience and necessity issued by the Interstate Commerce Commission which authorize operations as a common carrier by motor vehicle in interstate or foreign commerce. Certificate No. MC-107012 (Comp. Att. A)[1] authorizes household goods service, over irregular routes, between points in the United States;[2] while certificate MC-107012 Sub 30 (Attachment A hereto), the certificate in question, authorizes —

IRREGULAR ROUTES

> *Household goods,* as defined by the Commission, between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii.

Appellant began transporting household goods from and to Alaska in 1953. The traffic has been moved in two separate modes: (1) the so-called "highway" mode whereby cargo is transported by land from origin to destination in

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1 The reference "Comp. Att." refers to Appellant's complaint in the District Court and the attachments thereto. The reference "Comp. Par." refers to a paragraph of the complaint. It was agreed among counsel below that the complaint and the attachments would constitute the administrative record before the District Court.

2 Certificate No. MC-107012 was issued prior to January 3, 1959. In *Interpretation of Operating Rights — Alaska,* 81 M.C.C 701 (1959), the Interstate Commerce Commission held that the words "United States", as used in such certificates, do not include the State of Alaska.

motor vehicles via the Alcan Highway and other highways in the United States and Canada; (2) the so-called "land-sea-land" mode whereby cargo is transported by land in motor vehicles over highways between inland United States points and West Coast ports (generally Seattle, Washington), over the ocean aboard ocean vessels between West Coast ports and Alaskan ports, and by land in motor vehicles over highways in Alaska.

Ocean service is performed by Appellant between West Coast ports and Alaska ports in its capacity as a "non-vessel operating common carrier by water", recognized by the Federal Maritime Commission.[3] In either mode, Appellant issues its own bills of lading, charges rates published in its own tariffs filed with the Interstate Commerce Commission, and assumes sole common carrier liability from origin to destination.

The Alaskan operations constitute a significant element of Appellant's business. For the twelve month period beginning January 1, 1966 and ending December 31, 1966, Appellant transported 339 Alaska "highway" shipments with gross revenue of $302,361.79; while for the twelve month period beginning September 1, 1965 and ending August 31, 1966, Appellant transported 638 Alaska, "land-sea-land" shipments with gross revenue of $598,315.31 (Comp. Par. V and VI).

Between 1953 and the date of Alaska's admission into the Union (1959), Appellant's highway and land-sea-land operations, insofar as conducted outside the limits of the then United States, were not subject to the Commission's certificate requirements. Accordingly, Appellant's Alaskan

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[3] *Common Carriers By Water — Status of Express Companies, Truck Lines and Other Nonvessel Carriers,* 6 F.M.B. 245.

operations were conducted without any specific authority or certificate from the Commission.

In July of 1958, the statehood status of Alaska became imminent (Public Law 85-508, July 7, 1958; see note, 48 U.S.C. preceding §21). Appellant immediately applied for and received temporary authority from the Commission pursuant to 48 U.S.C. §310a (a). (Comp. Par. VI). That authority, issued December 31, 1958 and designated as Sub-23 TA, authorized the following service:

> *Household goods,* as defined by the Commission, over irregular routes, between points in Alaska, on the one hand, and, on the other, those points in the Continental United States which applicant is presently authorized to serve*** (Comp. Att. C).

The temporary authority was subsequently extended by the Commission until October 31, 1963, when it was superseded by the permanent Sub 30 certificate as hereafter related (Comp. Par. VI).

Alaska was formally admitted into the Union on January 3, 1959 (see note, 48 U.S.C. preceding §21). On July 12, 1960, Congress adopted 49 U.S.C. §§306 (a) (4) and 306 (a) (5) which provided for application to the Commission for a permanent "grandfather" certificate to serve Alaska as a common carrier by motor vehicle. Shortly thereafter Appellant filed such an application, but a final determination was not made by the Commission until October 21, 1963 (Comp. Par. VII).

Therefore, between December 31, 1958 (the date of the temporary authority granted by the Sub 23 TA certificate) and October 1, 1963 (the date the temporary authority was superseded by the permanent authority granted by the Sub 30 certificate), Appellant continued to operate from and to Alaska in both the highway and land-sea-land modes by

virtue of the temporary authority certificate (Comp. Par. VIII).

The fact of such operations was made known to the Commission in four formal route extension proceedings in 1959 and 1960 in which Appellant appeared as a protestant and gave evidence of its Alaskan operations (Comp. Att. D. and Att. E). In one of the proceedings, Appellant's service was the source of specific comment in the Commission's formal report. In *Dean Van Lines, Inc., Extension — Alaska,* decided July 19, 1960, officially reported at 83 M.C.C. 323 (Comp. Att. E), the Commission described Appellant's Alaskan service as follows:

> North American holds certificates, issued prior to January 3, 1959, authorizing, as pertinent, the transportation of household goods between points in Alaska, on the one hand, and, on the other, points in the rest of the continental United States, including Alaska, and operates a large fleet of equipment suitable for overland transportation of household goods to and from Alaska. *While movements to and from Alaska are handled through Seattle in conjunction with connecting water or air carriers, it supplements these movements with a relatively substantial volume of overland shipments from and to Alaska through its terminal at Great Falls, Montana.* It has considerable experience in Alaskan operations and has been so engaged since 1953 (83 M.C.C. 323, 326; emphasis supplied).
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> ***
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> We are of the opinion that applicant failed to sustain its burden of proving a need for the proposed service which cannot adequately be met by existing carriers. While we recognize that evidence of the present or future need for the transportation of household goods is difficult to obtain because of the non-repetitive character of the traffic, nonetheless, some showing must be made that existing carriers cannot or are not adequately serving the public. No such showing has

been made. *Since 1953, North American has rendered in a satisfactory manner, Alaskan service through Seattle in conjunction with water or air carriers and has supplemented such service with a relatively substantial volume of overland operations through its terminal at Great Falls* (83 M.C.C. 323,326, emphasis supplied).

As a result of the disclosures, and the language of the *Dean* case, Appellant was confident that the Commission had construed the language of the Sub 23TA certificate as including both highway and land-sea-land service. Appellant concluded that otherwise its dual service would not have been described as satisfactory by the Commission; and that if the lawfulness of such service was in any way suspect or unauthorized, the Commission would have said so at that time (Comp. Par. IX).

Subsequently, on October 1, 1963, the Commission finally determined Appellant's "grandfather" application. As a result, Appellant's temporary authority under the Sub 23 TA certificate was superseded by its permanent authority under the Sub 30 certificate. The nature of the language in the Sub 30 certificate is identical in substance to that employed in the Sub 23 TA temporary authority certificate; that is, "irregular routes, between points in Alaska, on the one hand, and, on the other, points in the (continental) United States". Appellant concluded that since the Commission had indicated in the *Dean* case that the language in the Sub 23 TA temporary authority certificate authorized both highway and land-sea-land service, the similar language in the permanent Sub 30 certificate likewise authorized such dual service (Comp. Par. X).

On March 9, 1964, Appellant's authority to conduct land-sea-land operations from and to Alaska under the Sub 30 certificate was questioned by an official of the Department of Defense acting on a complaint filed by a competi-

tor. Accordingly, Appellant dispatched a telegram to the Commission's Bureau of Motor Carriers seeking an informal opinion of the scope of the Sub 30 certificate. (Comp. Att. F). The Bureau responded by stating that at least until final Commission action on the then pending *Piggyback*, case,[4] "This Bureau cannot say that continuance under your Sub-30 of the long-continued motor-water-motor operations described . . . would be objectionable" (Comp. Att. G). The telegram was signed by Herbert Qualls, Director of the Commission's Bureau of Motor Carriers.

The *Piggyback* case was decided by the Commission on March 16, 1964. Thereafter, Appellant twice submitted applications to the Commission under 49 U.S.C. §317 and the regulations thereto,[5] seeking special permission to publish provisions in its tariffs in order to continue substituting land-sea-land service for all-highway service over a portion of the through route between the continental states and Alaska. In one of the applications, Appellant made specific reference to the Commission's language in the *Dean* case (Comp. Att. H). By orders dated June 17, 1964, and April 15, 1965, the Commission's Special Permission Board granted both requests (Comp. Att. I and Att. J). Since both special permissions were granted subsequent to the Commission's decision in the *Piggyback* case, and since the above referenced telegram from Herbert Qualls indicated

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4 Officially reported by the Commission as Ex Parte 230. *Substituted Service — Charges and Practices of For-Hire Carriers and Freight Forwarders (Piggyback Service).* 322 I.C.C. 301, review at 244 F. Supp. 935 (N.D. Ill. 1965), reviewed further *sub nom., American Trucking Ass'ns. v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 18 L. ed. 2d 847 (May 29, 1967).

5 The Commission's tariff regulations governing special permission applications were formerly designed as 49 C.F.R. 287.6. Effective December 20, 1967 (32 C.F.R. 2003) the regulations were redesignated as 49 C.F.R. 1307.6.

that the decision in that case was the only potential obstacle to continuation of land-sea-land service under the Sub 30 certificate, Appellant concluded that its right to conduct *both* highway and land-sea-land service under the certificate had once again been affirmed by the Commission (Comp. Par. XII).

As of early 1966, therefore, Appellant confidently construed the language of its sub 30 certificate as authorizing both highway and land-sea-land operations; or at least as authorizing the substitution of land-sea-land service for highway service pursuant to appropriate special permission applications and substitute service tariff provisions. Its conclusion was based on the clear language on the face of the Sub 30 certificate itself; and in reliance on the events heretofore related, that is, (1) that no member of the Commission or any of its staff had ever formally or informally questioned Appellant's land-sea-land service despite the fact that such service had been disclosed to the Commission on several occasions, (2) the decision of the Commission in the *Dean* case, (3) the opinion of Herbert Qualls for the Commission's Bureau of Motor Carriers, and (4) the substitute service tariff approvals of the Commission's Special Permission Board following the so-called *Piggyback* case (Comp. Par. XIII).

On March 1, 1966, however, Appellant received a letter from George A. Meyer, Director of the Commission's Bureau of Operations and Compliance. He stated that in his opinion land-sea-land service was not authorized under the language of Appellant's Sub 30 certificate, and that in order to continue rendering such service, some other type of authority would be required (Comp. Att. K). Since that opinion was in direct contravention of all of the prior formal and informal opinions of the Commission and its staff, Appellant found it necessary to take appropriate action in

order to terminate the controversy and to remove the resulting uncertainty (Comp. Par. XIV and Par. XV).

Proceedings Before The Commission

On June 20, 1966, Appellant filed a petition with the Commission seeking a declaratory order holding that the Sub 30 certificate authorizes land-sea-land service as well as highway service from and to Alaska; or, in the alternative, requesting that the Sub 30 certificate be modified to include whatever language was deemed appropriate to authorize both land-sea-land and highway service (Comp. Att. O). Smyth Overseas Van Lines, Inc., Alaska Van & Storage Co., Inc., and Air Van Lines, Inc., intervened in opposition to Appellant's petition (Comp. Par. XV and Par. XVI).

By order dater October 6, 1966, Division 1 of the Commission denied the petition (Appendix B hereto). Appellant filed a petition for reconsideration, but that petition was denied by the Commission on March 7, 1967 (Comp. Att. R.).

Proceedings In The Court Below

Having exhausted its administrative remedies, Appellant filed its complaint to the three-judge court seeking to have the Commission's order set aside. Appellant urged that the Commission's interpretation of the Sub 30 certificate as authorizing highway service only was arbitrary, capricious and in contravention of the plain language of the certificate; and, that the action of the Commission constituted a limitation, modification or revocation of Appellant's certificate in violation of 49 U.S.C. §312 (a) and without due process of law.

The court denied the relief requested (Attachment C hereto). Appellant thereupon instituted this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

The Decision Erroneously Requires Appellant To Transport Cargo Exclusively By Road

A principal concern of this appeal is whether a carrier which holds a certificate of public convenience and necessity authorizing operations by motor vehicle, over irregular routes, from and to Alaska, must confine itself to transportation of cargo exclusively by road, even though such a restriction does not appear on the face of the certificate. This Court has never reviewed the specific question,[6] but its recent comments concerning the general scope of a motor carrier franchise indicate that such a carrier is not so limited in its operations.

Elementary to the question is an appreciation of the unique geographic relation of Alaska to the 48 continental states. Whereas the continental states are physically connected by common boundaries, thereby affording a surface carrier a wide choice of possible routes for transporting cargo from one state to another, the geographic cleavage

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6 This Court did review *Andrews Van Lines, Inc. v. United States*, 240 F. Supp. 763 (D.C. Nebr. 1965), aff'd. *per curiam*, 382 U. S. 67 (1965), and *Aero Mayflower Transit Co., Inc. v. United States*, Civil No. IP 64-6-605 (S.D. Ind. 1966), aff'd. *per curium*, 387 U.S. 90 (1967). Those decisions expressed the proposition that a motor carrier could not prove that it had conducted highway operations in an Alaska "grandfather" proceeding by proof of past service by water only. The decisions did not touch the issue presented here, that is, once an irregular route motor carrier certificate is granted to serve Alaska without restrictions as to routes, is it to be interpreted as restricted to transportation by highway only. Furthermore, the decisions were based on the exclusive jurisdiction of the Federal Maritime Commission over water routes from and to Alaska as it existed in 1961. See *Andrews*, 240 F. Supp. 763, at 767-768. As shown later herein, that jurisdiction was transferred to the Interstate Commerce Commission on August 24, 1962 under the provision of §216(c) of the Interstate Commerce Act.

which separates those states from their sister state to the North confines such a carrier to a choice of only two alternative routes from and to Alaska. It may either endure the wild uncertainties of an all-highway trip over the Canadian portion of the Alcan Highway, or it may combine highway and ocean routes via port cities in the continental states and in Alaska. There are no other choices.

Shortly after Alaska's admission to the Union, the geographic realities were recognized by Congress. Effective July 12, 1960,[7] it amended §203 (a). (10) of the Interstate Commerce Act to provide for Commission regulation of rates, fares, charges, and practices of surface carriers incident to the all-highway route through Canada. Therefore, no one controverts that such service is authorized under Appellant's Sub 30 certificate.

Effective August 24, 1962,[8] Congress also amended §216 (c) of the Act to provide for Commission jurisdiction over all classifications, regulations and practices pertaining to the service of surface carriers over the land-sea-land route. That section permits motor common carriers to enter into joint rates and thru routes with other carriers, including non-vessel ocean carriers, for the transportation of cargo from and to Alaska. The *entire* service is made subject to the jurisdiction of the Interstate Commerce Commission. The legislation was enacted to provide shippers in the Alaskan trade with the benefits of one carrier responsibility and single-factor rates on traffic moving by motor and water.[9]

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[7] Section 3, Public Law 86-615, 86th Congress, 2d Session, approved July 12, 1960, 74 Stat. 384.

[8] Section 1, Public Law 87-595, 87th Congress, 2d Session, approved August 24, 1962, 76 Stat. 397.

[9] Senate Report No. 1799 (Aug. 1, 1962), U. S. Code Congressional and Administrative News, p. 2160 et seq. See particularly, pp. 2161-2162.

Appellant conducts land-sea-land operations under its Sub 30 certificate in harmony with that section. It has entered into joint rate and thru route tariffs, with itself as a non-vessel ocean carrier. Those traiffs, and the entire service thereunder, have twice been approved by the Commission in formal special permission tariff proceedings. In essence, Appellant substitutes ocean service for highway service over a portion of the through route.

While the Commission agrees that the Sub 30 certificate permits all-highway operations through Canada, it has declared that the certificate does not authorize service or substitution of service over the land-sea-land route. The District Court ascribes two reasons for that view: (1) the certificate is limited to operations by "motor vehicle", which words it interprets as confining a motor carrier to transportation of cargo exclusively by "highways", and, (2) the record in the "grandfather" proceeding which gave birth to the Sub 30 certificate indicates that land-sea-land service was not meant to be embraced thereunder. Both propositions are based on interpretations or interpretive processes which contravene principles of law established by this Court.

A. The Decision Misconstrues The Plain Meaning Of The Language In The Certificate, Particularly The Words, "By Motor Vehicle"

The basic consideration here is interpretation of the words in the Sub 30 certificate. Appellant concedes the general proposition that the Commission's interpretation of a Certificate is not to be disturbed by the courts unless it is arbitrary, capricious, or does violence to some established principle of law. The reasoning is that the Commission's

interpretation is entitled to special weight where it is based upon its accumulated knowledge and experience.

On the other hand, the plain meaning of words in a certificate is controlling in the absence of patent ambiguity. *Andrew G. Nelson v. United States,* 355 U.S. 554, at 557 (1958). Under those circumstances, no special weight should be attached to the Commission's interpretation since all that is required is to give ordinary and accepted meaning to the language of the certificate.

There is nothing patently ambiguous in the language in the Sub 30 certificate. It authorizes service (a) *over irregular routes,* (b) *between the continental United States, on the one hand, and, on the other, points in Alaska,* (c) *by motor vehicle.*

Absent a specific route restriction, an *irregular route* authority permits operations over any route or combination of routes, between the points specified in the certificate. Compare *Brady Transfer & Storage Co., Extension — Wisconsin,* 51 M.C.C. 770, at 774 (1950). In that regard, it is noteworthy that there is no specific route restriction in Appellant's Sub 30 certificate. Neither the highway nor the land-sea-land routes are specifically included or excluded. The certificate simply states that service is authorized over "irregular routes".

Likewise, words of geographic limitation, such as *between* (points in Alaska), *on the one hand, and,* (points in the continental states) *on the other,* have a well-established meaning. They are words ordinarily used in certificates to permit operations to originate at one base point and to be carried on to a destination at the other base point. Compare *Jack Cole Co., Inc., Common Carrier Application,* 32 M.C.C. 199, at 199, 208-209 (1942).

The Commission and the District Court seem to have no quarrel with the plain meaning of those two phrases as used in the Sub 30 certificates. It is the words *by motor vehicle* which cause them to restrict the certificate against land-sea-land operations. The District Court stated that since a common carrier "by motor vehicle" is defined in §§203 (a) (13) and 203 (a) (14) of the Interstate Commerce Act as a carrier which operates by means of the highway, the Sub 30 certificate can only authorize routes which embrace transportation exclusively by road, i.e., the all-highway route.[10]

The effect of that interpretation is to require Appellant, and all other motor carriers similarly situated, to conduct operations from and to Alaska exclusively by road. No other choice of routes or service is available, including the opportunity to substitute ocean service for highway service over a portion of the through route.

This Court recently commented, however, that the meaning of the words *by motor vehicle* is not so restrictive. In *American Trucking Ass'ns. v. Atchison, Topeka & Santa*

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10 Appendix C, page 10c. This Court's attention is directed to that portion of the Commission's order (Appendix B, page 2b) which indicates that Appellant must possess additional authority, which would read "between points in Alaska", in order to lawfully render land-sea-land service. Apparently the Commission considers that such a certificate could be tacked or combined with Appellant's existing authority "between points in the United States" to render a through service. Considering the Commission's decision in *Willett Pipe Line Stringing Corp. Ext. — Alaska*, 92 M.C.C. 41 (1963), its position poses an anomaly. In the *Willett* case the Commission found that authority "between points in Alaska" could not be tacked or combined with authority "between points in the contiguous 48 states" for purpose of providing a through service, because there is no point of joinder which is common geographically to the two separate authorities. *Willett*, at pp. 45-46. Therefore, Appellant's remedy, as proposed by the Commission, would be unavailing.

Fe Ry.,[11] the authority of the Interstate Commerce Commission to promulgate trailer-on-flatcar, or so-called "piggyback" rules, was at issue. During the course of the proceeding, certain parties contended that motor carriers cannot perform or substitute service by rail since transportation by road is the exclusive basis of their franchise.[12] This Court stated otherwise, however, at 18 L. ed. 2d. 859:

> The Interstate Commerce Act defines a "common carrier by motor vehicle" as "any person which holds itself out to the general public to engage . . . in transportation by motor vehicle." *This does not exclude joint arrangement with water carriers or rail carriers which are expressly permitted by section 216 (c) on a voluntary basis,* and according to the appellant's and the District Court, it is not inconsistent with the use of open-tariff TOFC if the railroad is willing. Clearly, to, a trucker which utilizes a ferry to transport his trailer and its cargo is not violating the statute or his certificate. *We may properly assume, therefore, that the Act cannot be construed to require that the trucker must always transport its cargo exclusively by road"* (Emphasis supplied).

There is nothing therefore in the language of Appellant's Sub 30 certificate which confines its Alaska operation to transportation exclusively by road. The words *by motor vehicle* do not prohibit Appellant from entering into an arrangement under §216 (c), as it does, to provide land-sea-land service as a substitute for all-highway service over a portion of the through route. To hold otherwise would impose a *regular route* restriction in the certificate, as contrasted with the existing *irregular route* language; and it would emasculate the Congressional intent of §§203 (a) (10) and 216 (c) to overcome the barriers of geography by

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11 Full citation at footnote 4 herein.

12 18 L. ed. 2d 847, at 858.

providing, under the jurisdiction of the Interstate Commerce Commission, for one responsibility, single-factor service from and to Alaska, whether by highway, or by a combination of water and highway.

The District Court interpreted the words *by motor vehicle* contrary to their meaning as heretofore found by this Court.

B. The Decision Is Based On Extraneous Matters, Contrary To Lawful Interpretive Processes

As an additional reason for holding that Appellant's Sub 30 certificate does not authorize land-sea-land service, the Commission and the District Court looked behind the certificate to the "grandfather" proceeding out of which it was issued. They concluded that land-sea-land service was not intended to be authorized in that proceeding; and therefore, it is not embraced in the Sub 30 certificate.[13] Appellant disputes that finding, but as argued hereafter, whatever the facts of the "grandfather" case, they are irrelevant.

The interpretive process followed by the Commission and the District Court violates a fundamental rule of certificate construction. "Absent patent ambiguity, it is well established that the Commission will not refer to the underlying grandfather operation." *Andrew G. Nelson v. United States, supra,* at 557 (footnote 3). More recently, the rule was elaborated at length in *T. I. McCormack Trucking Co., Inc. v. United States,* 251 F. Supp. 526 (D.C.

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[13] Appendix B, page 3b; Appendix C, pages 10c-11c. The District Court noted: "North American's certificate cannot be interpreted apart from the historical background which gives rise to it." This is the heart of the District Court's error.

N.J. 1966). After citing the *Andrew G. Nelson* case, the district court commented (at 530):

> One cardinal rule is that the certificate must speak for itself. In the absence of patent ambiguity the Commission refuses to consider extraneous matters, including the record which gave birth to the certificate in question. And this rule is followed regardless of whether the practical result is to confer upon the carrier more or less authority than may have been intended to be granted originally *** Moreover, the Commission has consistently held that a validly issued certificate may authorize transportation not contemplated at the time is was granted *** and services within a larger territory than was intended *** As pointed out by the Commission in *Manhattan Coach Lines, Inc. v. Adirondack Transit Lines, Inc.*, 42 M.C.C. 123, 126, *any other rule would contribute an intolerable uncertainty to the finality of any right granted.*" (Italics by the district court).

There is no patent ambiguity in the language of the Sub 30 certificate. As indicated above, all of the pertinent language has well accepted meaning. In fact, nowhere in the decisions of the Commission or of the District Court is there one thought that either tribunal found the language uncertain or ambiguous.

It is therefore contrary to law for the Commission and the District Court to refer to the record and decision in Appellant's "grandfather" proceeding in order to interpret the Sub 30 certificate. In cases, as here, where there is an absence of patent ambiguity, the interpretive process does not include a determination of what was intended in the underlying proceeding, or what the carrier proved therein, or even how the carrier actually operates today. The only question is, what do the plain words of the certificate mean

and what do they authorize? Whether they mean more or less than was intended is irrelevant.

It is error for the Commission and the District Court to read restrictive language into the Sub 30 certificate and to interpret the certificate as requiring Appellant to operate by highway only.

II.

The Action Of The Interstate Commerce Commission Constitutes A Partial Revocation Of Appellant's Certificate Without Due Process Of Law

A certificate of public convenience and necessity, such as Appellant's Sub 30 certificate, is property of value entitled to constitutional protection. *Movers Conference of America v. United States,* 205 F. Supp. 82, at 84 (S.D. Calif. 1962).

The Interstate Commerce Commission is empowered to limit, modify or revoke an existing certificate only after resort to the formal notice and hearing procedures of §212 (a) of the Interstate Commerce Act. Failure to do so constitutes a taking of property without due process of law. *Movers Conference,* at 86.

Appellant recognizes that a distinction is sometimes made between action by the Commission which constitutes a revocation of a certificate and that which simply amounts to interpretation of operating authority. Since the latter is lawful without resort to §212 (a), the task of a reviewing court is to determine the character of the Commission's action. Does it constitute a revocation of authority or is it merely interpretive of pre-existing rights? Compare, *De*

Camp Bus Lines v. United States, (D.C. N.J. 1963), 15 CCH Fed. Car. Cases ¶81,577.[14]

The Court below found that the Commission's action does not constitute a partial revocation of Appellant's Sub 30 certificate. By reference to the record and decision in Appellant's "grandfather" proceeding, the Court concluded that the Commission merely "interpreted" the authority as never being intended to embrace land-sea-land service in the first place.[15]

But as heretofore argued, the District Court erred by permitting the Commission to indulge in an interpretive impropriety. In the case of an unambiguous certificate, reference to secondary sources is "but a thinly veiled violation of the protection allowed existent and operating authority by 49 U.S.C. §312 (a)." *Parkhill Truck Company v. United States,* 240 F. Supp. 842, at 845 (D.C. Okla. 1965). It is clearly established that the Commission is not empowered to revoke a certificate under the guise of interpretation. *Andrew G. Nelson, Inc. v. United States, supra,* at 558 (footnote 4).

Appellant urges further, however, that even if reference to secondary sources is permitted, the Commission's action still cannot be considered as mere "interpretation", in view of the history of its conduct and attitude toward Appellant's land-sea-land operations. While estoppel or reliance may not be appropriate labels, Appellant contends that the

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14 "Thus, it must be determined whether the Commission's action is an interpretation or construction of the scope of [Plaintiff's] certificates, or, on the other hand, a modification, change, or revocation of the same. If the Commission's action is determined to be a modification, change, or revocation (either wholly or partially) of [Plaintiff's] certificates, it is unlawful and must be set aside for the procedure prescribed in Section 212 was not pursued."

15 Appendix C, page 9c.

law is or ought to be that when the Commission, by its acts and omissions, causes the meaning of a certificate to be long understood and accepted as embracing a particular kind of service, it cannot later, by "interpretation", restrict the certificate against that service without resort to §212 (a) of the Act. To do otherwise constitutes a denial of due process.

Appellant can find no Supreme Court decision which reaches this particular issue. It suggests, however, that this Court should adopt the rationale of *Movers Conference of America v. United States, supra,* as being applicable here.

In the *Movers Conference* case the Commission had known for years that motor carriers which held household goods certificates were performing moves which did not necessarily involve the change of abode of a householder. Despite its knowledge, it had never attempted to prosecute any mover for operating in that fashion. Subsequently, the Commission adopted a rule which "interpreted" a household goods certificate as only embracing moves which involve a change of abode.

The movers challenged the rule in the federal district court on the ground that it deprived them of property rights under their certificates. The Commission argued, as it does here, that the change of abode rule was always intended to be part of the household goods definition; and it cited previous cases which it claimed warned the movers of that proposition and which dispelled any notion that it had acquiesced to any other construction.

The court did not agree with the Commission, however. It said that since the Commission was fully aware of the past practices of the movers and yet had undertaken no action to prevent the activity, it had, in effect, "acquiesced" in the broad definition of household goods as previously understood by the movers. The court concluded that the

Commission's proposed interpretive rule redefined household goods in a manner different from the existing definition commonly accepted within the industry. Since it did so in a manner other than as prescribed in §212 (a), it deprived the carriers of property rights without due process of law.

Appellant contends that its facts are equivalent, at least in their effect and consequence, to those in the *Movers Conference* case. They are related in detail earlier herein. In summary, (1) Appellant operated in land-sea-land service from 1953 to late 1958 without the need for a certificate, (b) in 1958 it was granted temporary authority in Sub 23TA to operate between points in Alaska, on the one hand, and, on the other, points in the continental United States, (c) during 1959 and 1960 it participated in four Commission proceedings which involved disclosure of its Alaska land-sea-land operation, (d) in one of the proceedings (the *Dean* case), the Commission denied a competitive application because of the adequacy of Appellant's service, (e) in 1963 Appellant was granted its permanent Sub 30 certificate which read substantially the same as its Sub 23TA certificate, (f) in 1964 Appellant was advised by the Commission's Bureau of Motor Carriers that continuance of its land-sea-land operations was not objectionable, (g) in 1964 and 1965 the Commission's Special Permissions Board approved Appellant's request to file substitute service land-sea-land tariffs, (h) during the entire time involved (1953-1965) the Commission never attempted, formally or informally, to require Appellant to cease operations even though the Commission was well aware they were being conducted.

The District Court found that such a course of dealing between the Commission and Appellant's land-sea-land service could not be characterized as revocation of the Sub 30

certificate. Appellant urges that the District Court confused the trees with the forest. It rejected each isolated instance as being non-persuasive of acquiescense, but it failed to account for their cumulative effect. It may be that each instance, standing alone, would not amount to acquiescence. Their combined force, however, produces the same climate as the *Movers Conference* case.

Appellant was led to believe that it could conduct land-sea-land operations and it acted on that belief. The Commission was fully aware of Appellant's belief, and nothing it ever did was calculated to inform Appellant that its understanding was in error. To the contrary, the Commission's overt acts time and again fostered the belief and bolstered Appellant's understanding.

The Commission should not be permitted to induce a long accepted understanding of the scope of a franchise, and then suddenly restrict the franchise in a proceeding other than that prescribed by law. To hold otherwise would frustrate the certainty and continuity essential to an extensively regulated industry, and would leave unprotected those legitimate carrier expectations based on Commission action.

This Court is therefore asked to hold that the Commission has restricted Appellant's Sub 30 certificate in a manner contrary to its meaning as understood and accepted for years by Appellant and by the Commission; and that such action, not being pursuant to §212(a) of the Interstate Commerce Act, unlawfully deprives Appellant of property without due process of law.

CONCLUSION

Appellant poses two questions not yet resolved by this Court: (1) Is a motor carrier franchise to serve Alaska over irregular routes confined exclusively to transportation by highway? (2) May the Commission, by its overt acts and by its silence, induce an understanding of the scope of a franchise and permit a carrier to operate for a substantial length of time with that understanding, and subsequently rule that the franchise is more restrictive, without resort to the procedures of §212 (a) of the Interstate Commerce Act? Appellant contends that the District Court erred in its consideration of both questions. Those errors substantially affect Appellant's interest and it is respectfully prayed that they are of such significance as to warrant plenary consideration by this Court.

Respectfully submitted,

MARTIN A. WEISSERT
P. O. Box 988
Fort Wayne, Indiana

Attorney for Appellant

April, 1968.

APPENDIX A

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

C-15.4

SERVICE DATE
OCTOBER 1, 1963

No. MC 107012 SUB 30

NORTH AMERICAN VAN LINES, INC.,
FORT WAYNE, INDIANA

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 1st day of October, A. D., 1963

AFTER DUE INVESTIGATION, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

IT IS ORDERED, That the said carrier be, and it is hereby, granted this Certificate of Public Convenience and Necessity as evidence of the authority of the holder to engage in transportation in interstate or foreign commerce as a common carrier by motor vehicle; subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier.

IT IS FURTHER ORDERED, and is made a condition of this certificate that the holder thereof shall render reasonably continuous and adequate service to the public in pursuance of the authority herein granted, and that failure so to do shall constitute sufficient grounds for suspension, change, or revocation of this certificate.

AND IT IS FURTHER ORDERED, That the transportation service to be performed by the said carrier in interstate or foreign commerce shall be as specified below:

IRREGULAR ROUTES:

Household goods, as defined by the Commission,

Between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii.

By the Commission, division 1.

HAROLD D. MCCOY,

Secretary.

APPENDIX B

SERVICE DATE
October 21, 1966

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the 6th day of October , A. D. 1966.

No. MC-C-5209

NORTH AMERICAN VAN LINES, INC.,
PETITION FOR A DECLARATORY ORDER
(Fort Wayne, Ind.)

It appearing, That on June 20, 1966, North American Van Lines, Inc., a motor common carrier holding authority from this Commission in Docket No. MC-107012 and various sub-numbers thereunder, filed a petition requesting issuance of a declaratory order interpreting its authority in certain respects, or, in the alternative, requesting that certain of its certificates be amended;

It further appearing, That on July 6, 1966, Smith Overseas Van Lines, Inc., and Alaska Van & Storage Co., Inc., filed a motion to reject that petition, which motion we shall treat as a reply to the petition;

And it further appearing:

1. That petitioner, North American Van Lines, Inc., holds certificate No. MC-107012 authorizing the transpor-

tation of household goods, as defined by the Commission, between all points in the United States except Alaska and Hawaii; and certificate No. MC-107012 (Sub-No. 30), issued under the "grandfather" provisions of section 206 (a) (4) of the Interstate Commerce Act, authorizing the transportation of household goods, as defined by the Commission, between points in Alaska, on the one hand, and, on the other, points in the United States except points in Alaska and Hawaii.

2. That the above-described authority does not authorize patitioner to conduct operations as a motor carrier between points in Alaska, nor does petitioner have any other authority under which transportation between points in Alaska may be performed.

3. That petitioner contends that, from and continuously since 1953, it has transported household goods from and to Alaska in two separate modes: (a) the so-called "highway" mode whereby household goods are transported in all motor vehicle service via the ALCAN highway, and (b) the so-called "land-sea-land" mode whereby household goods are transported by motor vehicle between inland United States points and West Coast Ports, by ocean vessel between West Coast Ports and Alaska Ports, and by motor vehicle within Alaska, that in both instances petitioner issues its own bill of lading, charges rates published in its own tariffs, and assumes sole common carrier liability from origin to destination; and that in performing such service petitioner in effect "substitutes" water service for a portion of its authorized motor service.

4. That in the instant petition, petitioner asks that a declaratory order be issued stating that its participation in this "land-sea-land" service, in the manner described in the

immediately-preceding paragraph, is authorized by its outstanding certificates and is lawful; or, in the alternative, that such certificates be modified to authorize such operations.

5. That in No. MC-107012 (Sub-No. 30), *North American Van Lines, Inc., Alaska Grandfather Application*, in an examiners' report and recommended order, served on July 10, 1963, it was found specifically that petitioner had not, either before or after the admission of Alaska to Statehood, engaged in any motor-carrier operations within Alaska, but that any Alaskan motor transportation performed in connection with shipments moving from or to Alaska by water, which petitioner had transported within the contiguous 48 States, had been performed by an independent Alaska-based carrier; that petitioner took no exception to this finding or to the examiners' recommendation that its application to the extent that it sought authority to operate between all points in Alaska be denied; and that the said recommended order became effective as the order of the Commission by operation of law, in the absence of exceptions, on August 9, 1963.

6. That in No. MC-107012 (Sub-No. 24), *North American Van Lines, Inc., Extension—Alaska,* in an examiner's report and recommended order served on September 16, 1964, it was found that applicant had failed to establish that the present and future public convenience and necessity require applicant's proposed operations between points in Alaska, which authority was found to be needed in order for applicant to conduct motor carrier operations in Alaska in connection with the land-sea-land operations there under consideration, and that the said recommended order became effective as the order of the Commission by operation of law, in the absence of exceptions, on November 2,

1964. See *United Van Lines, Inc., Extension—Alaska,* 99 M.C.C. 331.

Wherefore, and good cause appearing:

We find:

1. That because petitioner lacks authority under which it may conduct motor-carrier operations between two points within Alaska, it may not lawfully substitute water service between Alaska Ports, on the one hand, and, on the other, Ports in the 48 contiguous States for a portion of its authorized line-haul motor-carrier service in conducting operations between points in Alaska, on the one hand, and, on the other, points in the United States except Alaska and Hawaii. See *United Van Lines, Inc., Extension — Alaska, supra; Substituted Service—Piggyback,* 322 I.C.C. 301, 355; and *Gilbert Carrier Corp. Extension — Kearny, N. J.,* 72 M.C.C. 204.

2. That petitioner's reliance upon statements contained in the report of the Commission, Division 1, in *Dean Van Lines, Inc., Extension — Alaska,* 83 M.C.C. 322, concerning petitioner's operations between points in Alaska, on the one hand, and, on the other, points in the contiguous 48 States, is misplaced. The statements in the *Dean* case referred to do not indicate that petitioner performed actual motor service between points in Alaska in connection with the considered land-sea-land service, and, in any event, are based upon testimony adduced by petitioner in its role as protestant to Dean's application; such testimony was offered at a hearing held June 8, 1959, only six months after Alaska became a State, prior to which time such operations could have been conducted lawfully without authority; there was no reason in the *Dean* case to question whether the operations petitioner claimed to be conducting were actually being performed by it; and subsequently, when this issue was

squarely presented in No. MC-107012 (Sub-No. 30), *North American Van Lines, Inc., Alaska Grandfather Application,* the contrary finding was made and was not contested by petitioner.

3. That petitioner's reliance (a) upon informal opinions of members of this Commission's staff that the operation in question might lawfully be continued pending the decision in *Substituted Service — Piggyback, supra,* and (b) upon the fact that certain special permissions which were granted by this Commission might be construed as condoning such operations, are, likewise, misplaced because this Commission's failure to reject a tariff covering an unauthorized operation, and the informal opinion of Commission employees concerning such an operation, are not binding upon this Commission and cannot operate to convey new authority. See *Simpson—Investigation and Revocation,* 73 M.C.C. 75.

4. That petitioner has not justified amendment of its certificates to authorize the operations under consideration because such modification would be warranted only upon a showing that the public convenience and necessity require a new motor-carrier service. Its proper remedy, should it wish to pursue this end, is to file an application for additional authority under section 207 of the Interstate Commerce Act.

It is ordered, That petitioner be, and it is hereby, notified that its outstanding certificates of public convenience and necessity do not authorize it to perform motor carrier transportation within the State of Alaska with respect to operations by the so-called "land-sea-land" mode whereby household goods are transported by motor vehicle between inland United States points and West Coast Ports (within the contiguous 48 States), by ocean vessel between West

Coast Ports and Alaskan Ports, and by motor vehicle within Alaska.

And it is further ordered, That in all other respects the relief sought by the instant petition be, and it is hereby, denied.

By the Commission, division 1.

H. NEIL GARSON,

Secretary.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

NORTH AMERICAN VAN LINES, INC., *Plaintiff,*	)	
v.	)	
UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Defendants.*	)	FORT WAYNE CIVIL NO. 1875

MEMORANDUM OF OPINION AND JUDGMENT

This is an action brought to enjoin, annul, and set aside the orders of the Interstate Commerce Commission, Division 1, entered October 6, 1966 and March 7, 1967 in Docket No. MC-C-5209, *North American Van Lines, Inc., Petition for a Declaratory Order.* By its orders, the Commission found that North American Van Lines, Inc., (hereinafter North American) was without authority to transport household goods between points in Alaska and that without such authority North American could not move household goods between ports and inland points in Alaska before or following their water movement to or from Seattle or other Pacific Coast ports.

Plaintiff filed this action May 3, 1967. The Jurisdiction of this three-judge court was invoked pursuant to 28 U.S.C.

§§ 1336, 1398, 2284, and 2325, and 5 U.S.C. § 1009. Air Van Lines, Inc., intervened as a defendant on May 31, 1967, and Smyth Overseas Van Lines, Inc., and Alaska Van & Storage Co., Inc., intervened as defendants on June 8, 1967.

The relief sought by North American must be denied.

Plaintiff North American is engaged in the business of transporting household goods in interstate and foreign commerce by motor vehicle. Since 1953, plaintiff has been transporting household goods to and from Alaska in the so-called "highway" mode, that is, over the Alcan Highway and other highways in the United States and Canada. Household goods have also moved to and from Alaska in the so-called "land-sea-land" mode, whereby the goods are transported overland by motor vehicle between inland United States points and West Coast ports, over the ocean by vessels between West Coast ports and Alaskan ports and overland by motor vehicle from the Alaskan ports to points within Alaska. Since 1953, household goods have moved to and from Alaska in this "land-sea-land" mode under through bills of lading issued by North American and at rates published by North American and filed with the Interstate Commerce Commission. However, the actual carriage of household goods by motor vehicle within Alaska in connection with North American's "land-sea-land" service has been conducted by Alaska-based agents of North American.

Prior to Alaska's admission to statehood on January 3, 1959, the transportation of household goods in Alaska was not subject to the requirements of a certificate of authority from the Interstate Commerce Commission. When Alaska's statehood became imminent, North American applied to the Interstate Commerce Commission, pursuant to 49 U.S.C. § 310a (a), for temporary authority to engage in Al-

askan operations. On December 31, 1958, the Commission issued a certificate granting temporary authority to North American to transport

> "Household goods . . . over irregular routes, between points in Alaska, on the one hand, and, on the other, those points in the continental United States which applicant is presently authorized to serve . . . "

This temporary authority was extended by the Commission to October 1, 1963, when North American's permanent authority went into effect.

North American's application for permanent operating authority was based upon the so-called "grandfather" acts, 49 U.S.C. §§ 306 (a) (4) and 306 (a) (5), which went into effect July 12, 1960. 49 U.S.C. § 306 (a) (4) provides for the issuance of certificates by the Commission, authorizing service between Alaska and the other continental United States, to carriers who had been engaging in such service on and continuously since August 26, 1958, without a requirement of proof that the public convenience and necessity would be served by such a certificate. Similarly, 49 U.S.C. § 306 (a) (5) provides for similar "grandfather" certificates authorizing service between points in Alaska to be issued to carriers who had operated between points in Alaska on and continuously since August 26, 1958. Pursuant to these acts, North American applied to the Interstate Commerce Commission for permanent authority to operate between Alaska and points in the other continental United States and also for permanent authority to operate between points in Alaska.

The Commission disposed of these applications in a consolidated proceeding entitled *Mollerup Van Lines Alaska Grandfather Application,* 95 M.C.C. 338 (1963). In this proceeding, the Commission granted North American's application for authority to operate its all-highway service be-

tween Alaska and the other continental United States. However, the Commission specifically denied North American's application for authority to operate in Alaska in connection with the "land-sea-land" mode. The Commission adopted as its own the findings of the examiner. Thus, at 95 M.C.C. 344, the Commission found:

> "It is abundantly clear that none of the several applicants has ever actually conducted any motor operations in Alaska. Their claims to 'grandfather' rights in this category [the 'land-sea-land' mode] are based on the operations of certain Alaska-based motor carriers which they refer to as their agents."

On the basis of this finding, to which North American did not take exception, the Commission held that North American was not entitled to a "grandfather" certificate authorizing carriage of goods between points in Alaska and that without such authority North American could not operate in the "land-sea-land" mode between Alaska and the other continental United States. The certificate issued to North American as a result of this proceeding authorizes service as a common carrier by motor vehicle

> "Between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii." Certificate of Public Convenience and Necessity No. MC 107012 (Sub 30).

It is abundantly clear from the proceeding in which this certificate was issued that the certificate was intended to authorize service between Alaska and the other continental United States only by the highway mode. Authority to operate in Alaska in connection with the "land-sea-land" mode was expressly denied.

On June 20, 1966, North American petitioned the Interstate Commerce Commission for an order declaring that the certificate which had been granted in the *Mollerup* pro-

ceeding authorized service between Alaska and the other continental United States in the "land-sea-land" mode. On October 6, 1966, the Commission, acting without a hearing, entered an order holding that North American's certificate did not authorize Alaskan overland operations in connection with "land-sea-land" service. On December 5, 1966, North American petitioned the Commission for reconsideration of the order of October 6. On March 7, 1967, the Commission denied reconsideration. These two orders of the Commission give rise to the instant case.

North American contends that these orders by the Interstate Commerce Commission amount to a "revocation" of a part of North American's authority within the meaning of 49 U.S.C. § 312 and that the orders are therefore void because the Commission did not follow the procedures set out in that section. North American also contends that if the Commission orders are only an interpretation, they are clearly erroneous and must therefore be set aside. In this connection, North American argues particularly that its certificate unambiguously authorizes "land-sea-land" operations and that even if the certificate is an all-highway certificate, North American may lawfully substitute ocean service for a part of its highway service. The defendants contend that the Commission action was an interpretation of the authority originally granted to North American and that the statutory requirements for a revocation therefore are not applicable. The defendants further contend that the Commission's interpretation of North American's certificate had a rational basis and may not be set aside. The defendants also contend that North American may not lawfully substitute ocean service for land service under its present certificate because that certificate fails to authorize carriage between the Alaskan port of substitution and inland Alaskan points.

It is clear that the Interstate Commerce Commission may not revoke a certificate under the guise of "interpretation" and thereby circumvent statutory procedural requirements. *Andrew G. Nelson, Inc. v. U.S.* 355 U.S. 554, 78 S.Ct. 496 (1958); *W. T. Mayfield Sons Trucking Co. v. U.S.*, 234 F. Supp. 655 (N.D. Ga. 1964) *Movers Conference of America v. U.S.* 205 F.Supp. 82 (S.D. Cal. 1962). But it is equally clear that the orders which North American here seeks to set aside are not a revocation of authority.

North American's contention that the Interstate Commerce Commission action is a revocation stems from its assertion that North American has been continually carrying on "land-sea-land" operations for fourteen years, and the Commission has repeatedly acquiesced in these operations.

The first difficulty with this contention is that it is directly contrary to the Interstate Commerce Commission's finding in *Mollerup Van Lines Alaska Grandfather Application, supra,* that North American has always used agents in the performance of the Alaska overland portion of "land-sea-land" service.

A second difficulty with the contention is that the supposed acts of Commission "acquiescence" upon which North American relies are not, as North American contends, Commission asquiescence in performance by North American *itself* of the Alaska overland portion of "land-sea-land" service.

The Commission has rejected certain applications of other carriers for Alaskan service, allegedly on the basis that North American was satisfactorily performing such service. See, *e.g., Dean Van Lines, Inc., Extension—Alaska,* 83 M.C.C. 323 (1960). But these alleged acts of "acquiescence" occurred in 1959 and 1960, several years before is-

suance of the certificate which North American now claims the Commission is partially revoking. There is no indication that North American's temporary certificate issued under 49 U.S.C. § 310a (a), its so-called "Sub-23TA" certificate, authorized a greater service than the permanent certificate now under consideration. But even if it is assumed arguendo that the Sub-23TA certificate was broader, the granting of a narrower permanent authority would not be a revocation, because 49 U.S.C. § 310a (a) expressly provides that a grant of temporary authority "shall create no presumption that corresponding permanent authority will be granted thereafter." So Commission acquiescence in activities taking place in 1959 and 1960 can in no way support an argument that the Commission is revoking a certificate issued in 1963.

Moreover, it is perfectly plausible that the Commission might reject other applications for Alaskan service on the basis that North American, *in cooperation with Alaska-based agents*, was satisfactorily providing such service. Such a rejection of other applicants by the Commission would in no way imply that North American was operating or could operate overland in Alaska *without* the use of such agents. Thus, a finding by the Commission, in the context of other applications for Alaskan service, that North American was performing such service is in no way an acquiescence by the Commission in the performance by North American itself of the Alaska overland portion of "land-sea-land" service.

North American also points to applications filed with the Commission for special permission to file substitution provisions in its tariffs in order to render "land-sea-land" service. These applications were granted by a Commission Special Permission Board in June 1964 and April 1965.

North American argues that these actions are an "acquiescence" in conduct by North American itself of the Alaska overland portion of "land-sea-land" service, thereby making the Commission's most recent orders a revocation. The principal difficulty with this contention is that the approval of a joint traiff covering all segments of a shipment is not to be confused with a grant of authority to perform all segments of the shipment. In *Mollerup Van Lines Alaska Grandfather Application, supra,* the same proceeding in which the Commission found that North American was not itself performing Alaskan overland operations in connection with "land-sea-land" service, the Commission also found that

> "the household goods handled by these applicants [including North American] are generally covered by a single bill of lading issued on the masthead of a state-side carrier and covering movement from origin to destination at a single-factor rate." 95 M.C.C. at 341, 342.

Thus, the Commission finds no difficulty in the publication of rates to cover the full length of a shipment, part of which must be performed by an Alaskan agent with the requisite operating authority. Approval of a tariff therefore carries no implications whatever about operating authority. Moreover, the Commission has given no indication that approval of tariffs by a Special Permission Board may be relied upon as an interpretation of operating authority; and in the absence of such an indication, no reliance upon such approval would be justified.

Finally, North American points to an advisory opinion from the Director of the Bureau of Motor Carriers of the Interstate Commerce Commission to the effect that the continuation of the service described in North American's re-

quest would not be "objectionable" while a case then pending before the Interstate Commerce Commission was still under consideration. This opinion was in no way an act of the Commision. The opinion was given in answer to a request by North American for an informal statement of the position of the Bureau of Motor Carriers. Moreover, the opinion is based upon a representation from North American that it had long been conducting the motor carrier operations in question, and this representation was contrary to the facts as found by the Commission in *Mollerup*. Even if the advisory opinion could be considered as an interpretation by the Commission, which it clearly cannot be, the validity of the opinion ended by its own terms when the decision referred to in that opinion was rendered.

At the time it issued North American's certificate No. MC 107012 (Sub 30), the Interstate Commerce Commission held that North American could not transport household goods between points in Alaska in connection with "land-sea-land" service. The Commission has done nothing since that time which would change that holding. The Commission's two most recent orders therefore do not constitute a revocation of North American's certificate.

North American next contends that this interpretation of its certificate must be set aside as clearly erroneous. This court is not free to interpret an Interstate Commerce Commission certificate for itself. The court must accept the Commission's interpretation unless that interpretation is found to be clearly erroneous. *Andrew G. Nelson, Inc. v. U.S.*, 355 U.S. 554, 78 S. Ct. 496 (1958). This court holds that the Commission's interpretation of North American's certificate is entirely reasonable and consistent with the Congressional purpose in enacting 49 U.S.C. §§ 306 (a) (4) and 306 (a) (5).

North American claims that the certificate is clear on its face and that the court therefore may not consider the record from which the certificate originated. If the certificate is viewed solely on its face, it tends, if anything, to support the position of the defendants. The certificate authorizes, in pertinent part,

> "transportation in interstate or foreign commerce as a common carrier by motor vehicle . . . between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii."

The term "common carrier by motor vehicle" is unambiguously defined in 49 U.S.C. §§ 303 (a) (13) and 303 (a) (14) as a carrier by means of the highway.

North American's certificate is based upon a so-called "grandfather" act; that is, whatever authority North American possesses must come by reason of operations conducted on and continuously since the date designated by Congress in the Act. For this reason, North American's certificate cannot be interpreted apart from the historical background which gives rise to it. If the certificate is viewed in this fashion, the interpretation of the Commission is amply justified and reasonable. The Commission has made a distinction between the "highway" mode and the "land-sea-land" mode and has held that Alaskan overland operations in the "land-sea-land" mode cannot be conducted without authority to serve between points in Alaska. This distinction is based upon a finding that prior to the Congressional grandfather date, North American conducted Alaskan overland operations in connection with the "highway" mode, but *not* between points in Alaska in connection with the "land-sea-land" mode. The Congressional purpose in enacting 49 U.S.C. §§ 306 (a) (4) and 306 (a) (5) was obviously to base

operating authority in Alaska, at least to begin with, upon the practices of carriers in Alaska prior to Alaska's admission to the Union. The orders of the Commission carry out the Congressional purpose by giving effect to North American's own practice as the Commission has found it. The orders of the Commission are therefore proper.

North American contends that even if its certificate authorizes only an all-highway service, the Commission has clearly erred in holding that North American may not substitute water for highway service over a portion of the route. North American cities as authority for this proposition *American Trucking Associations v. Atchison, Topeka, and Santa Fe Railway Co.*, 387 U.S. 397, 87 S. Ct. 1608 (1967). In this case the Supreme Court was considering the validity of certain Interstate Commerce Commission rules authorizing motor vehicle carriers to use railroad "piggyback" service without concurrence of the railroad. In this context, the Supreme Court said that the Commission may lawfully *authorize* a common carrier by motor vehicle to use means of transport other than road. Nothing in the Court's opinion suggests that motor vehicle carriers may substitute water service *without* Interstate Commerce Commission authority.

The court finds that the order of the Interstate Commerce Commission of October 6, 1966, which interprets North American's certificate No. MC 107012 (Sub 30) as not authorizing Alaskan overland operations in connection with the "land-sea-land" mode and the Commission's order of March 7, 1967, denying reconsideration, are lawful in all respects. The relief sought by North American in its complaint must therefore be denied. This memorandum contains the court's findings of fact and conclusions of law as

provided in Rule 52 (a) of the Federal Rules of Civil Procedure.

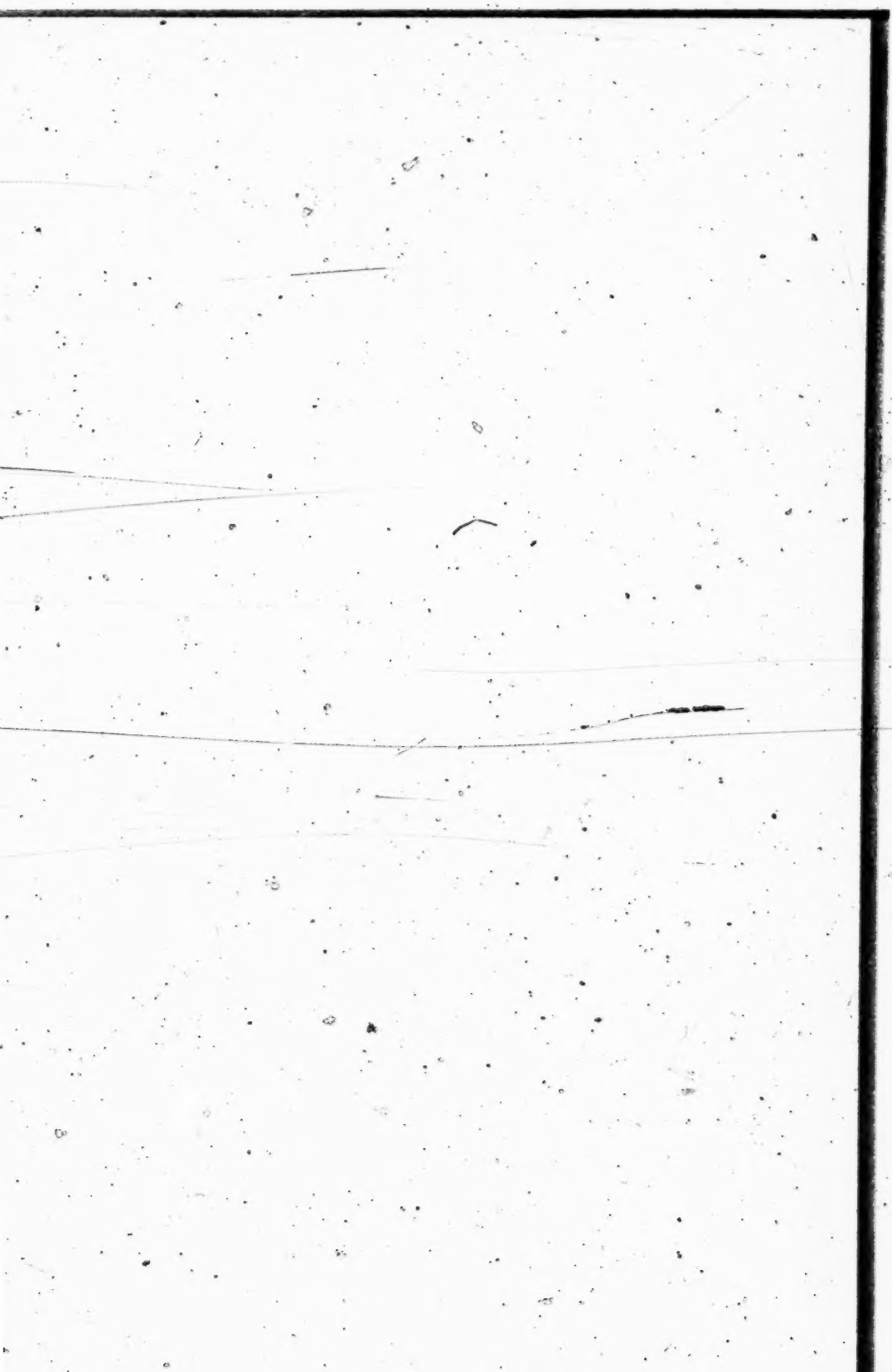
Accordingly, plaintiff's complaint filed herein is dismissed.

Entered this 20th day of December, 1967.

WALTER J. CUMMINGS
Circuit Judge

ROBERT A. GRANT
District Judge

JESSE E. ESCHBACH
District Judge



[illegible]

No. 765

[illegible]

In the Supreme Court of the United States

October Term, 1967

NORTH AMERICAN VAN LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court
for the Northern District of Indiana

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1295

NORTH AMERICAN VAN LINES, INC., APPELLANT

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Northern District of Indiana

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States of America and the Interstate Commerce Commission jointly move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the decision of a three-judge district court (J.S. 1c-12c; 277 F. Supp. 741) unanimously sustaining the Interstate Commerce Commission's interpretation of appellant's motor car-

rier certificate (J.S. 1b-6b). In pertinent part, the certificate authorizes appellant to engage in the "transportation [of household goods] . . . as a common carrier by motor vehicle . . . between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii" (J.S. 1a-2a). On appellant's petition for a declaratory order of interpretation, the Commission held that appellant was not authorized to transport household goods between points in Alaska and, that without such authority, appellant could not move such goods between ports and inland points in Alaska before or following their movement by water to or from Seattle or other Pacific Coast ports in the continental United States (J.S. 2b, 5b-6b, 1c).[1]

Household goods have historically moved between Alaska and the continental United States by two basic modes of transportation. In the "highway mode", the goods are transported entirely by motor vehicle, moving over the Alcan Highway and other highways in the United States and Canada. In the "land-sea-land mode", the goods are transported by ocean vessel between Alaskan and continental ports, moving to and from inland cities by motor vehicle at both ends of the ocean journey.

Prior to Alaska's admission to statehood on January 3, 1959, motor carriers operating in Alaska were not subject to the certificate requirements of the In-

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[1] Appellant holds another certificate which authorizes it to transport household goods between all points in the United States except Alaska and Hawaii (J.S. 1b-2b). That certificate is not involved in this proceeding.

terstate Commerce Act. In 1958, however, all interstate motor operations in Alaska were brought within the Commission's regulatory authority, and carriers were required to obtain certificates of public convenience and necessity from the Commission. "Grandfather" rights were provided, without requiring proof of public convenience and necessity, for those carriers conducting Alaskan operations on and since August 26, 1958 by either the highway mode (49 U.S.C. 306 (a)(4)) or the land-sea-land mode (49 U.S.C. 306 (a)(5)). J.S. 2c-3c; see *Andrews Van Lines, Inc.* v. *United States*, 240 F. Supp. 763 (D. Nebr.), *affirmed per curiam*, 382 U.S. 67.

Appellant applied to the Commission for grandfather rights (1) to operate by the highway mode between points in Alaska, on the one hand, and, on the other, points in the continental United States; and (2) to operate between points in Alaska in connection with shipments moving by the land-sea-land mode. As to the highway mode, the Commission in 1963 found that appellant had "conducted substantial overland operations between points in Alaska and points in the South-48 continuously since prior to the statutory date" and granted a certificate authorizing the continuance of such operations. *Mollerup Van Lines Alaska Grandfather Application*, 95 M.C.C. 338, 343, sustained *sub nom. Andrews Van Lines, Inc.* v. *United States*, *supra*.[2] Authority to engage in opera-

[2] Appellant's application and those of a number of other carriers seeking Alaska grandfather authority were consolidated and decided in a single report with the *Mollerup* application.

tions within Alaska in connection with the land-sea-land mode was denied, however, on the ground that no such operations had been conducted by appellant itself. Rather, the Commission found that the operations between ports and inland points in Alaska upon which appellant relied had actually been conducted by various Alaska-based motor carriers who were themselves entitled to grandfather certificates. *Mollerup, supra*, 95 M.C.C. at 344-345; J.S. 3c-4c.

Appellant subsequently sought to obtain authority, on grounds of public convenience and necessity, to conduct operations within Alaska in connection with land-sea-land service in its own right, instead of operating by agency or interline arrangements with Alaska-based carriers. Denying the application, the Commission found that no public need for the proposed service had been shown, since "existing services, motor-water and all-highway, are meeting all requirements" of the shipping public. *North American Van Lines, Inc., Ext.—Alaska*, No. MC-107012 (Sub-No. 24), decided September 16, 1964 (unreported); J.S. 3b-4b.

The instant proceeding began when appellant in 1966 filed a petition with the Commission requesting a declaratory order that its certificate authorized it to engage in Alaskan operations in connection with the land-sea-land service, or, in the alternative, requesting amendment of its certificate to provide such authority. On October 6, 1966, the Commission, acting without a hearing, entered an order notifying appellant that its certificate does not authorize it to perform such service in Alaska, and that amendment of

appellant's certificate would be warranted only upon a showing of public convenience and necessity. On March 7, 1967, the Commission denied reconsideration.

Appellant brought this action to set aside the Commission's order, asserting that the Commission's interpretation of its certificate was clearly erroneous, and that the order amounted to a revocation of a part of appellant's authority and is void because the Commission did not follow the procedures required by statute for a revocation (49 U.S.C. 312). The three-judge district court unanimously held that "the Commission's interpretation of North American's certificate is entirely reasonable" (J.S. 9c) and that the order did not constitute a revocation (*ibid.*). Accordingly, the court sustained the Commission's order.

ARGUMENT

The three-judge district court unanimously rejected the arguments which appellant advances here. We submit that the decision below sustaining the Commission's order is correct, and that this case presents no issue warranting plenary consideration by this Court.

1. Having granted appellant's grandfather application only with respect to highway service between Alaska and the continental United States, and having twice denied appellant's applications for additional authority to conduct Alaskan operations in connection with land-sea-land service, the Commission properly held that appellant's certificate did not au-

thorize it to perform such operations within Alaska.[3] In our view, the Commission's interpretation of appellant's certificate is demonstrably correct; it certainly cannot be said to be "clearly erroneous" so as to warrant judicial modification. *Nelson, Inc.* v. *United States*, 355 U.S. 554, 558.

The Commission has consistently held that the Alaska segment of land-sea-land service may be performed only by carriers holding authority to operate between points in Alaska; see *United Van Lines, Inc., Ext.—Alaska*, 99 M.C.C. 331, 336-337. As the Commission noted, appellant has no "authority under which it may conduct motor-carrier operations between two points within Alaska" (J.S. 4b). Appellant is thus clearly precluded from treating the ocean segment of the land-sea-land route as a substitute for part of its highway authority and itself performing the required Alaskan motor service on the route, since the transportation of shipments between Alaskan ports and inland Alaska points is beyond the scope of appellant's certificate. Compare *Substituted Service—Piggyback*, 322 I.C.C. 301, 355, sustained *sub nom. American Trucking Associations* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397. Thus, the district court properly found the Commission's interpretation of appellant's certificate to be "amply justified and reasonable" (J.S. 10c).

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[3] The Commission was not required, as appellant suggests (J.S. 20-22), to close its eyes to its prior denial of land-sea-land Alaskan operating authority, even in the absence of patent ambiguity in the certificate. *Nelson, Inc.* v. *United States*, 355 U.S. at 554, 558 n. 3; *Sims Motor Transport Lines* v. *United States*, 183 F. Supp. 113, 117 (N.D. Ill.), *affirmed per curiam*, 362 U.S. 637.

Further, the court below noted that the Commission's interpretation is fully consistent with the Congressional purpose in enacting the Alaska grandfather provisions. Since the Commission had found that appellant had not itself engaged in operations in Alaska in connection with the land-sea-land mode, the Commission's order gives effect "to North American's own practice as the Commission has found it" (J.S. 11c).[4]

2. There is no substance to appellant's assertion that the Commission's interpretation constituted an improper revocation owing to an alleged long-standing acquiescence by the Commission in appellant's performance of land-sea-land operations. To the extent that appellant relies upon Alaskan operations purportedly conducted by it prior to the Commission's determination of its grandfather application in *Mollerup* in 1963, appellant's claims are flatly contradicted by the Commission's finding in *Mollerup* that appellant itself had engaged in no operations within Alaska in connection with land-sea-land service (*supra* at p. 4). And if appellant has in fact conducted Alaskan operations in connection with land-sea-land service since *Mollerup*, it has done so in plain disregard of the Commission's denial in *Mollerup* of appellant's application for such authority.[5]

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[4] The Commission's order does not interfere with appellant's established practice of utilizing Alaska-based carriers in connection with its land-sea-land service.

[5] The only circumstances subsequent to the *Mollerup* decision upon which appellant relies are an informal opinion of a Commission employee and the acceptance of a tariff by a board of agency employees, neither of which is in any way

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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MAY 1968.

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binding upon the Commission in interpreting the scope of the operating authority conferred by appellant's certificate. *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 298562 746

IN THE

Supreme Court of the United States

MAY 6 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1967

No. 1295

NORTH AMERICAN VAN LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court
for the Northern District of Indiana,
Forth Wayne Division

MOTION TO AFFIRM

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May 6, 1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1295

NORTH AMERICAN VAN LINES, INC.,
Appellant,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court
for the Northern District of Indiana,
Forth Wayne Division

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Smyth Overseas Van Lines, Inc., Alaska Van & Storage Co., Inc., and Air Van Lines, Inc., Intervening Appellees in the proceedings below, jointly move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a judgment of a three-judge District Court (JS1c-12c) unanimously dismissing Appellant's suit to set aside the order of the Interstate Commerce Commission denying Appellant's request that the Commission find that its Alaska "grandfather" certificate No. MC-107012 (Sub 30) authorizes motor carrier operations between "points in Alaska" in connection with "land-sea-land" operations (JS 1b-6b).

Historically, there have been two distinct methods of moving household goods traffic to and from Alaska: (1) an all-highway overland service through Canada over the Alcan Highway, and (2) land-sea-land service, comprising three separate segments of a through service (a) between interior points in the contiguous 48 States and Seattle, (b) between Seattle and an Alaska port via ocean carrier under the jurisdiction of the Federal Maritime Commission, and (c) between the Alaska port and an interior Alaska point.

Following Alaska Statehood, Congress enacted the so-called Alaska Grandfather Act to provide for permanent certification, on a "grandfather" basis, of carriers which had conducted Alaska operations prior to Statehood. Congress provided for two types of "grandfather" certification for motor carriers: one where the motor carrier was "...the holder of a certificate authorizing transportation by motor vehicle between places in the United States and the Territory of Alaska, and on August 28, 1958, ...was engaged in the transportation of passengers or property as a common carrier by motor vehicle between places in the United States and places in Alaska...", 49 U.S.C.§ 306(a)(4); and secondly, "where the carrier, on August 28, 1958, was... engaged in the transportation in interstate or foreign commerce of

passengers or property by motor vehicle between places in the Territory of Alaska...", 49 U.S.C. § 306(a)(5).

Appellant duly filed its "grandfather" application under both 49 U.S.C. § 306(a)(4) and § 306(a)(5). A formal hearing was held on this application in 1963 in *Mollerup Van Lines, Inc., Alaska Grandfather Application, et al.*, 95 M.C.C. 338 (1963), in which the Commission granted appellant a "grandfather" certificate under 49 U.S.C. § 306(a)(4) on the basis of its all-highway, overland, motor carrier operations, authorizing transportation "Between points in Alaska, on the one hand, and, on the other, points in the United States, except Alaska and Hawaii", but specifically denied appellant "grandfather" authority "between points in Alaska", under 49 U.S.C. § 306(a)(5).

Three years later, appellant filed a petition requesting a declaratory order from the Interstate Commerce Commission interpreting its Alaska "grandfather" certificate as authorizing both "highway" and "land-sea-land" service. By Order of the Commission (October 6, 1966), affirmed by Division 1, acting as an Appellate Division (March 7, 1967), appellant's requested relief was denied (JS 1b-6b). On appeal to the three-judge District Court below, the Commission's order holding that appellant's Alaska "grandfather" certificate did not authorize transportation "between points in Alaska" in "land-sea-land" service, was unanimously upheld (JS 1c-12c).

ARGUMENT

The question presented by appellant whether it must confine itself to an all-highway operation under its Alaska "grandfather" certificate is a false issue. The decisions below merely require that before anyone can lawfully

transport cargo by road "between points in Alaska" he must obtain the appropriate operating authority from the Interstate Commerce Commission as required by Congress.

The second question raised, *viz.*, whether appellant's certificate was partially revoked by the Commission's declaratory order is directly dependant upon whether appellant's certificate ever authorized it to conduct motor carrier operations between an interior point in Alaska and an Alaska port in connection with land-sea-land service.

We submit that these questions are not of first impression, but were resolved by the Commission contrary to appellant's position in the very proceeding in which the certificate was issued, have been reaffirmed and consistently followed by the Commission ever since, and upheld by the Courts on at least three occasions.

In *Mollerup Van Lines, Inc., Alaska Grandfather Application, et al.*, 95 M.C.C. 338 (1963), *aff'd., Andrews Van Lines, Inc. v. United States*, 240 F. Supp. 763 (D.C. Nebr. 1965), *aff'd. per curiam*, 382 U.S. 67 (1965), the proceeding in which appellant's certificate was granted, the Commission made it perfectly clear that a grant of *overland* authority, such as appellant received, did not include authority to operate "between points in Alaska" in connection with the land-sea-land mode.

In *United Van Lines, Inc., Extension - Alaska*, 99 M.C.C. 331 (1965), *aff'd., Andrews Van Lines, Inc. v. United States*, 259 F. Supp. 468 (D.C. Nebr. 1966), the Commission again made clear that the land-sea-land mode of service required operating authority which read "between points in Alaska".

Lastly, the Court's attention is directed to the judgment of the District Court for the Southern District of Indiana, Indianapolis Division, in *Aero Mayflower Transit Co., Inc. v. United States,* Civil Action No. IP 64-C-605, entered June 15, 1966, *aff'd. per curiam,* 387 U.S. 90 (1967), wherein the decision of the Commission in *Mollerup, supra,* was again upheld.

Three times now the Commission's determination that "land-sea-land" operations are separate and distinct from "overland" operations, and that different operating authority is required for each, has been subjected to Court review. Each time the Commission had been upheld by the reviewing District Court, and twice affirmed by this Court. We submit therefore that the Commission's Order in no way constituted a partial revocation of appellant's Alaska "grandfather" authority since motor carrier operations "between points in Alaska" in connection with land-sea-land service were at no time authorized under its certificate. The decision below therefore does not diminish any certificated operating right appellant ever had.

Since appellant was specifically denied the appropriate authority necessary to perform land-sea-land operations, and appellant's Alaska "grandfather" certificate on its face does not authorize operations "between points in Alaska", the filing of a joint tariff *with itself,* in the dual capacity of a motor and a water carrier, under the guise of "substituted" water for motor service, cannot operate to confer such authority. A tariff is simply a holding out to provide service and carries no implication whatsoever that the service offered is authorized or will be lawful. Nor is appellant correct in asserting (JS-15) that the permissive provisions of Section 216(c) of the Interstate Commerce Act result in the transfer of jurisdiction from the Federal Maritime Commission to the Interstate Commerce

Commission of the entire land-sea-land service between the continental United States and Alaska. Public Law 87-595 (76 Stat. 397), authorizing the voluntary establishment by motor carriers of joint rates with *other* carriers, including water common carriers subject to the Shipping Act, 1916, neither expressly nor impliedly revokes the Alaska Grandfather statute above-cited from which appellant derived its certificate, nor Section 27(b) of the Alaska Statehood Act which reserved to the Federal Maritime Commission exclusive jurisdiction over transportation on the high seas between the continental United States and Alaska (72 Stat. 33), nor 49 U.S.C.A. § 903(e)(3) which specifically subjects motor carriers operating as water carriers to and from Alaska to the jurisdiction of the Federal Maritime Commission.

Appellant's reliance on a "substituted service" concept fails because it holds no operating authority between an Alaskan interior point and an Alaskan port, and therefore it cannot substitute another service at a point to or from which it cannot lawfully operate, *Gilbert Carrier Corp. Extension - Kearny, N.J.*, 72 M.C.C. 204. Nor can appellant substitute a service which is not also subject to the jurisdiction of the Interstate Commerce Commission. *Substituted Freight Service*, 232 I.C.C. 683. See also *United, supra.* Appellant's attempt to support its mistaken "substituted service" theory by the quotation of isolated language from this Court's decision in *Atchison, Topeka & Santa Fe Railway v. United States*, 387 U.S. 397, is unavailing since nowhere does this decision suggest that *Mollerup, Andrews, United* and *Aero Mayflower, supra,* are reversed.

The decisions below are clearly supported by the applicable law.

CONCLUSION

It is respectfully submitted that neither question raised by appellant warrants plenary consideration of this Court. The judgment of the District Court should be affirmed.

Respectfully submitted,

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May 6, 1968

SUPREME COURT, U. S.

No. 1236

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NORTH AMERICAN VAN LINES, INC., *Appellant*

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1295

NORTH AMERICAN VAN LINES, INC., *Appellant*

v.

UNITED STATES OF AMERICA
INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

Pursuant to Rule 16.(4) of the Rules of this Court, Appellant North American Van Lines, Inc., respectfully files this brief in opposition to Appellees' Motions to Affirm.

I.

THE DECISION ERRONEOUSLY REQUIRES APPELLANT TO TRANSPORT CARGO BY ROAD

A. *The Decision Misconstrues The Plain Meaning Of The Language In The Certificate, Particularly The Words, "By Motor Vehicle."*

The initial question is what do the words of Appellant's Sub 30 certificate mean when they state that operations are

authorized as a common carrier by motor vehicle, over irregular routes, between points in Alaska, on the one hand, and, on the other, points in the continental United States.

Appellees contend that the certificate confers the right to transport cargo by highway only. They argue that the Interstate Commerce Commission has "consistently" held that in order to conduct land-sea-land operations a carrier needs additional authority which reads "between points in Alaska". (M.A. 6; I.M.A. 4-5).[1]

Appellees collectively cite *Mollerup Van Lines, Inc., Alaska Grandfather Application,* 95 M.C.C. 338, *aff'd., Andrews Van Lines, Inc. v. United States,* 240 F. Supp. 763 (D.C. Neb. 1965), *aff'd. per curiam,* 382 U.S. 67 (1965); *Aero Mayflower Transit Co., Inc. v. United States,* Civil Action No. IP 64-C-605, June 1, 1966, *aff'd. per curiam,* 387 U.S. 90 (1967); and *United Van Lines, Inc., Ext. — Alaska,* 99 M.C.C. 331 (1965), *aff'd., Andrews Van Lines, Inc. v. United States,* 259 F. Supp. 468 (D.C. Neb. 1966). None of those cases hold what Appellees claim they do, however; nor do they settle the question which Appellant poses to this Court.

The *Mollerup-Andrews* and *Aero Mayflower* cases merely expressed the proposition that a motor carrier could not prove in a "grandfather" case that it had been operating overland if its evidence showed past service by water only. Moreover, the decisions were based on the exclusive jurisdiction of the Federal Maritime Commission over water routes from and to Alaska as it existed in 1961. See, *Andrews,* 240 F. Supp. 763, 767-768. As detailed in Appellant's

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[1] The reference to "M.A." is the Motion to Affirm filed by the Interstate Commerce Commission and the United States of America. The reference to "I.M.A." is the separate Motion to Affirm filed by Intervenors Smyth Overseas Van Lines, Inc., Alaska Van & Storage Co., Inc., and Air Van Lines, Inc.

Jurisdictional Statement,[2] jurisdiction over joint motor-water service from and to Alaska was transferred to the Interstate Commerce Commission on August 24, 1962 under the provisions of §216 (c) of the Interstate Commerce Act [49 U.S.C. §316 (c)].

The *United-Andrews* case is likewise inappropriate. All that the Commission held was that when a carrier *"not subject"* to the Interstate Commerce Act performs a line-haul ocean or air service between ports in the continental United States and ports in Alaska, it needs additional motor carrier authority "between points in Alaska" to complete the transportation of cargo inland. See *United,* 99 M.C.C. 331, 336-337. The decision is irrelevant here since Appellant *is subject* to the Act and its *entire* joint motor-water service from and to Alaska *is subject* to the exclusive jurisdiction of the Interstate Commerce Commission under §216 (c).

Even if Appellees' citations are considered as approximately relevant, it cannot be said that the Commission has reached settled or consistent conclusions. Appellees fail to cite, for example, the Commission's conflicting decision in *Willett Pipe Line Stringing Corp. Ext. — Alaska,* 84 M.C.C. 542 (1961). There it was urged, as Appellees now urge, that in order to render a through service from and to Alaska a carrier would have to tack or combine its continental states authority with additional "between points in Alaska" authority. The Commission held, however [84 M.C.C. 542, 544]:

> "We conclude that applicants cannot tack their existing authority to transport the involved commodities between points in the United States, except Alaska, with the authority granted below ['between points in

[2] J. S. 15-16.

Alaska'] so as to provide a through service to and from points in Alaska."

The Commission reiterated that conclusion after further hearing. *Willett Pipe Line Stringing Corp. Ext. — Alaska*, 92 M.C.C. 41, 46 (1963). Thus, Appellees proposed remedy for Appellant, that is to acquire additional "between points in Alaska" authority, would be unavailing since it could not be tacked or combined with existing continental states authority for the purposes of rendering a through service. Appellees do not explain the inconsistency of these decisions with their stated position.

Appellees also cite two other cases for the proposition that to substitute ocean service for highway service over a portion of the through route from and to Alaska, a carrier, such as Appellant, requires additional authority to serve "between points in Alaska" (M.A. 6; I.M.A. 6). *Gilbert Carrier Corp. Extension—Kearny*, N. J., 72 M.C.C. 204 (1957); *Substituted Service—Piggyback*, 322 I.C.C. 301, 355 (1964), *reviewed sub nom., American Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 18 L. ed 2d 847 (1967).

Neither case involved Alaska or the unique geographic relation of that state to its sister states to the south. Further, if the decisions have any relevance, they add weight to Appellant's claim.

In the *Gilbert* case, the Commission held that motor carriers have authority to render trailer-on-flatcar or substitute rail for motor service between points they are authorized to serve. 72 M.C.C. 204, 206. The Commission made a similar finding in the *Substituted Service* case. At page 355 of that report, the page to which Appellees refer, the Commission held: "***we believe that these carriers should

be limited to the use of TOFC service only between points they are authorized to serve."

Appellant's authority confers the right to conduct operations between points in the continental United States, on the one hand, and, on the other, points in Alaska. Thus, its substituted service between continental ports and Alaskan ports is in fact "between points it is authorized to serve". Its operation is in complete accord with the Commission's pronouncements in the *Gilbert* and *Substituted Service* cases.

In summary, none of Appellees' citations are to the point. The question here is once a motor carrier certificate is issued to serve between points in Alaska, on the one hand, and, on the other, points in the continental United States, without a restriction as to routes, is it to be interpreted as restricted to transportation by highway only? The question has never been adjudicated. It remains unsettled and is appropriate for consideration by this Court.

B. *The Decision Is Based On Extraneous Matters Contrary To Lawful Interpretive Practices.*

Appellees insist that Appellant has twice been clearly denied authority to conduct land-sea-land operations and that it cannot now enhance its franchise in an interpretation proceeding. They claim that appropriate applications by Appellant were filed and disapproved as a part of the *Mollerup-Andrews* and *United-Andrews* decisions (M.A. 3-4; I.M.A. 3).

There is nothing in this record to sustain Appellees' claim. The final order in the Commission's *Mollerup-Andrews* case made no distinction between highway and land-sea-land service with respect to Appellant. The ultimate finding stated only that Appellant was authorized to continue operations "between points in Alaska, on the one

band, and, on the other, points in the continental United States other than Alaska, over irregular routes".[3] The essence of the order, giving effect to the ordinary meaning of the words employed, was to authorize continuation of the dual highway and land-sea-land service which Appellant had conducted under the similarly worded Sub 23TA temporary authority and which the Commission had found to be adequate in *Dean Van Lines, Inc., Extension — Alaska*, 83 M.C.C. 323 (1960).[4]

It cannot be said therefore that the order "clearly" denied Appellant the right to conduct land-sea-land operations. There was absolutely no mention in the ultimate finding of a restriction as to routes. Whatever the Commission may have intended, the words employed authorized "continuation" of Alaska service, "over irregular routes".

Appellees' reference to the *United-Mollerup* case is likewise not only irrelevant, it is misleading. Appellant did not seek land-sea-land authorization in that proceeding as Appellees are well aware. Appellant's application and evidence was related to traffic moving solely by motor vehicle between Canada and Alaska [Comp. Att. Q., p. 20].[5] It is simply untrue that Appellant was denied land-sea-land authority. The service was in no way involved.

Moreover, Appellant's technique of going behind the clear language of the Sub 30 certificate can be employed just as well to prove that the Commission *twice approved* Appellant's land-sea-land operations. Appellant demon-

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[3] 95 M.C.C. 338, 345.

[4] J.S. 9-10.

[5] The reference "Comp. Att." refers to Appellant's complaint in the District Court and the attachments thereto. It was agreed among counsel below that the complaint and the attachments would consitute the administrative record before the District Court.

strated in its Jurisdictional Statement, for example, that in the *Dean* case the Commission reviewed the land-sea-land operations under the Sub 23 TA temporary authority and found them adequate and satisfactory. It can even be shown further that the Commission approved the service again after the Sub 30 certificate was issued.

In *Trans-American Van Service, Inc.—Alaska*, 94 M.C.C. 248 (1963), one of Appellant's competitors sought to extend its household goods rights from and to Alaska, both in the highway and land-sea-land modes. Appellant protested, appeared at the hearing, and presented evidence of its duplicating services. If the Commission viewed Appellant's dual operations as unlawful at that time, it was constrained to so find. *C & H Transportation Co., Inc., Extension*, 94 M.C.C. 711, 715 (1964).[6] The Commission made no such finding, however. It stated only, and by negative inference, approvingly [94 M.C.C. 248, 250]:

> "At the time of the hearing herein, protestant held temporary authority to transport household goods between points in the contiguous states, on the one hand, and, on the other, points in Alaska. Since that time, it has been granted *similar authority* under the Alaska 'grandfather' provisions of the Act. No. MC-107012 (Sub-No. 30), *North American Van Lines, Inc., Alaska Grandfather Application*, in which the examiner's recommended order became effective by operation of law on August 9, 1963. It has engaged extensively in transporting Alaska household goods traffic since 1953" (Emphasis supplied).

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[6] Citing *Worster Motor Lines, Inc. v. United States*, 226 F. Supp. 603 (W.D. Pa. 1963), where the court held: "In the opinion of the Court this, of necessity, requires the Commission to review the scope of authority of each competing carrier which protests an application."

Thus, by going behind the certificate, it is as rational to conclude that the Commission has twice approved North American's land-sea-land service as it is to conclude that the Commission twice disapproved the service. It is for just such a reason that reference to secondary sources is an improper interpretive process in determining the scope of a patently unambiguous certificate. The results can be and often are, as they are here, confused and inconclusive.

Neither the Commission nor the District Court found Appellant's Sub 30 certificate to be anything less than clear and unambiguous. Likewise, Appellees make no such claim in their Motions to Affirm. This Court should therefore declare that it was error for the Commission and the District Court to refer to secondary sources in the process of determining the scope of the Sub 30 certificate. Compare, *Andrew G. Nelson v. United States*, 355 U.S. 554, 557, footnote 3 (1958).

II.

The Action Of The Interstate Commerce Commission Constitutes A Partial Revocation Of Appellant's Certificate Without Due Process of Law

Appellant presents a second issue. It contends that the action of the Interstate Commerce Commission, not being instituted under §212 (a) of the Interstate Commerce Act [49 U.S.C. §312 (a)], constitutes a partial revocation of the Sub 30 certificate without due process of law. Although the situation here has apparently never been before this Court, Appellant urges that the issue be resolved in conformity with *Movers Conference of America v. United States*, 205 F. Supp. 82 (S.D. Calif. 1962).

Appellees do not particularly treat with the issue. Neither mentions the *Movers Conference* case and its analogy to the

existent facts; nor does either deny that the matter is one of first impression for this Court.

Appellees state only that Appellant had no cause to rely on its past operations since, by reference to the underlying *Mollerup-Andrews* and *United Andrews* cases, Appellant was clearly informed that its land-sea-land service had been disapproved (M.A. 7; I.M.A. 4-5). In essence their contention is an attack on the bonafides of Appellant.

Initially, the argument ignores the other acts and omissions of the Commission, over a long period of years, which give rise to the type of "acquiescence" found in the *Movers Conference* case.[7] Second, the argument is dependent on reference to secondary sources. As Appellant has heretofore urged, that interpretive process is inappropriate.

Most important, however, Appellees' argument is contradictory and self-defeating. They claim that it is not necessarily error to go behind an unambiguous certificate and determine its scope by reference to secondary sources [M.A. 6], citing *Andrew G. Nelson, supra,* 558, footnote 3, and *Sims Motor Transport Lines v. United States,* 183 F. Supp. 113, 117 (N.D. Ill.), *aff'd. per curiam,* 362 U.S. 637. Appellees contend that such a procedure is not violative of due process, even if its end result is to restrict a franchise.

Appellant might well agree. But what Appellees overlook or ignore is that both the *Nelson* and *Sims* cases were investigation and revocation proceedings under §212 (a). That is precisely what Appellant urges as error, i.e., that if the Sub 30 certificate was to be revoked or limited, then Appellant was entitled to the protections afforded under that section of the Interstate Commerce Act. Had the Commis-

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[7] Those facts are detailed at length, J. S. 6-12; and summarized, J. S. 25.

sion so proceeded, the protective incidents of an administrative hearing could have been obtained, the meaning and intent of secondary sources could have been fully explored, and Appellant's bonafides could have been proved or disproved by reference to a fairly developed record.

The Commission did not proceed under §212 (a), however. That failure, coupled with its "acquiescence" to Appellant's understanding of the Sub 30 certificate, was violative of due process of law. This Court is asked to so declare.

CONCLUSION

Appellant urged in its Jurisdictional Statement that the questions presented are substantial and that they are of such significance to its interests as to warrant plenary consideration by this Court. Appellees' Motions to Affirm contain nothing to detract from the merits of Appellant's plea.

Respectfully submitted,

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Attorney for Appellant

May, 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

NORTH AMERICAN VAN LINES, INC. *v.*
UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA.

No. 1295. Decided May 20, 1968.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.